

Will Tariff Wars Unravel the Multilateral Trading System?

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History is not unfamiliar with the rigours of tariff wars. Back in the 1930s, retaliatory tariff escalation led to the great depression, which in turn contributed to the Second World War. Leaders of the free world sought to revive the beleaguered global economy through free and fair trade. Years of negotiations aimed at increasing market access and curtailing protectionism culminated in the establishment of the World Trade Organization (WTO). The WTO provides a rule-based framework for conducting global trade, predicated upon multilateralism and an efficacious Dispute Settlement System.

The [recent trade war saga](#) is undermining the core tenets of the WTO. The unilateral imposition of additional tariffs on steel and aluminium by the US has spurred affected States to retort with counterbalancing tariffs. While the US has justified the hike in tariffs as necessary to protect its national security, the affected States have defended the imposition of retaliatory tariffs by characterizing the US action as a safeguard measure. At present, the Dispute Settlement Body (DSB) is confronted with the legitimacy of measures undertaken by both the US and the retaliating States. This presents an opportunity for the DSB to determine the role of multilateralism and power-play in global trade, as well as to reify its own relevance.

Trump Tariffs on Steel and Aluminium

This year the Trump administration had imposed additional import duties to the tune of 25% and 10% on [steel and aluminum](#) products respectively, against all WTO Members. This was in excess of USA's multilaterally committed bound tariffs on steel and aluminium and accordingly violated Article II(1)(a) and (b) of the General Agreement on Tariffs and Trade, 1994 (GATT). Further, by exempting certain States from the said measure, either provisionally or permanently, the US also violated the Most Favoured Nation principle (Article I(1), GATT). It is discernable, however, that the provisional exemption of Mexico and Canada was intended to tacitly influence the [NAFTA negotiations](#), and the exemption of South Korea resulted in a renegotiation of the [KORUS Free Trade Agreement](#). Thus, the abuse of multilateralism is being leveraged to bolster bilateral negotiations, and signals a transition from a rule-based to a power-based system.

The [US has cited](#) the impairment of its national security for imposing additional tariffs under Article 232 of the US Trade Expansion Act (1962). The US claims that it is overly reliant on imports of steel and aluminium, which has weakened its internal economy and affected its key military and commercial systems.

The US seeks to justify its action under Article XXI (b)(iii), GATT, which allows Members to take "any action which it considers necessary for the protection of its

essential security interests... taken in time of war or other emergency in international relations". The US argues that the said provision has a [self-judging character](#). In other words, the determination of whether a State's national security is jeopardized depends on the subjective satisfaction of that State alone, and is beyond the remit of review of the DSB. Panels have already been constituted in [United Arab Emirates – Goods, Services and IP Rights](#) and [Russia – Traffic in Transit](#) to determine if the national security clause has a self-judging character. An affirmative finding would encourage States to invoke the national security clause with impunity, as a means to shield GATT inconsistent measures from the DSB's review. However, an adverse finding could strengthen Trump's distrust of the WTO and reinforce his [desire to withdraw](#).

Retaliatory Tariffs by the Affected States

The affected States have rejected USA's national security defence, and instead characterized the US action as a "[safeguard in disguise](#)". In WTO parlance, a State may initiate safeguard action to redress a recent and temporary surge in imports which causes, or threatens to cause serious injury to its domestic industry. (Article XIX, GATT and Article I, Safeguards Agreement (SGA)).

A safeguard measure is fundamentally not directed against a GATT inconsistent surge in imports. Therefore, a State affected by a safeguard measure is entitled to seek compensation. Accordingly, the foremost response to the tariff hike by the affected States was to invite the US for compensation related [consultations](#) (Article 12.3 read with Article 8.1, SGA). However, the US refused to engage, arguing that the hike in tariffs was not a safeguard, but a national security measure.

Thereafter, [China](#), [India](#), [the EU](#), [Canada](#), [Mexico](#), [Norway](#), [Russia](#) and [Switzerland](#) filed WTO complaints against the US. They challenged *inter alia* USA's unwarranted invocation of the essential security clause, as well as the imposition of a WTO inconsistent safeguard measure. While the above matters were *sub judice* and a Panel was yet to be constituted, [China](#), [India](#), [the EU](#), [Canada](#), [Mexico](#), [Turkey](#), [Russia](#) and [Japan](#) concurrently imposed retaliatory duties against the US.

The foremost question, thus, is whether retaliatory tariffs can be legally enforced under the WTO framework. Retaliatory tariffs to a safeguard measure are WTO consistent. According to Article XIX:3, GATT read with Article 8.2, SGA, if a Member taking a safeguard measure does not compensate the affected States, the latter may respond by suspending "substantially equivalent concessions or other obligations". Since a safeguard measure is invoked in response to a GATT consistent surge in imports, therefore, affected States have a right to be compensated, failing which, they can impose retaliatory tariffs.

The second question is whether the retaliating States were required to await the DSB's determination of this issue prior to retorsion. The answer is 'no'. Retaliation pursuant to Article XIX:3, GATT read with Article 8.2, SGA, is an exception to Articles 22 and 23 of the Dispute Settlement Understanding, which prohibit self-help without the DSB's authorization. This is because the very purpose of retaliation

under the SGA is to immediately redress injury caused by a safeguard measure to the domestic industry of the affected State.

Thus, the only real challenge to the legality of retaliatory tariffs in the instant case is whether the US action can at all be characterized as a disguised safeguard. In July, 2018, the US filed WTO complaints against [China](#), [the EU](#), [Mexico](#), [Canada](#) and [Turkey](#), challenging the imposition of retaliatory tariffs. The US argued that its action was taken pursuant to the national security clause and had no trappings of a safeguard measure.

In August, 2018, the Appellate Body (AB) circulated its report in [Indonesia – Iron and Steel Products \(Viet Nam\)](#). The AB's approach on the classification of a safeguard measure would have a bearing on whether the US tariff hike could be classified as such. Produced below is para. 5.60 of the AB report:

In order to determine whether a measure presents such features, a Panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a Panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a Panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

The AB further stated that the design, structure, and expected operation must be assessed in relation to the two essential features of a safeguard measure: (i) whether it withdraws a GATT obligation or concession, and (ii) whether it is designed to prevent or remedy serious injury. (Para. 5.64)

Applying the above reasoning to the US measure, one can conclude with certitude that the US has violated its GATT obligations. However, it is debatable if serious injury to the US domestic industry can be said to exist. Thus far, the US has justified its action on the ground of national security and not serious injury. The fact that the AB has emphasized the relevance of national characterization, suggests that the balance may tilt in favour of the US.

However, the AB has also clarified that national characterization alone is not dispositive of the question. The report of the [US Department of Commerce](#) seems to suggest that the US measure is also designed to prevent or remedy serious economic injury to the US steel and aluminum industry, and may, therefore, be classified as a safeguard measure.

The determination of whether the US action constitutes a safeguard measure would be highly significant from a jurisprudential standpoint. Fetters must exist on the

definition of a safeguard measure, lest it gives other States a freehand to retaliate. It remains to be seen if retaliation against the US tariffs would pass muster.

In light of [USA's refusal to appoint Members to the WTO's Appellate Body](#), it is likely that the Appellate Body would cease to exist by the end of next year. Without the prospect of appeal, it is uncertain if the DSB would adopt a Panel report on the scope of the national security clause and retaliatory tariffs – casting a doubt over the very future of the WTO.

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